International Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO JUDGES AROUND THE WORLD

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Judges from Ten Common-Law Countries Meet in Washington for Five-Day Conference

Fifty-one delegates from 10 countries with the common-law tradition assembled in Washington, D.C., in May for a five-day judicial conference to discuss common issues and problems.

The Second Worldwide Common Law Judiciary Conference convened on May 25, 1997, at the U.S. Court of Appeals for the Federal Circuit. Participants in the conference spent the first day at the Nuclear Regulatory Commission (NRC) in Rockville, Md., viewing the NRC's technologically advanced courtroom and discussing uses of technology to reduce costs of litigation and increase court-management efficiency.

Judge B. Paul Cotter, chief judge of the NRC and principal organizer of the conference, presided over the morning and afternoon sessions.

Plenary sessions in the remaining four days of the conference were held at the Federal Judicial Center in Washington. Subjects covered in the plenary sessions included fair trial and free press, judicial independence and judicial accountability, judicial branch budgeting, judicial education, human rights, and administrative law and intellectual property issues.

Participating countries included Australia, Canada, India, Ireland, Israel, New Zealand, Singapore, South Africa, the United Kingdom (including Scotland and Northern Ireland), and the United States.

From left: Justice Henry Brooke, Royal Courts of Justice, England; Justice Shlomo Levin, deputy president of the Supreme Court of Israel; and Tan Boon Heng, assistant registrar, Supreme Court, Singapore. The three attended the Second Worldwide Common Law Judiciary Conference at the Federal Judicial Center in Washington, D.C., in May. The five-day conference included judges from 10 common-law countries.

Judge Cotter, who also organized the first such conference in 1995, said that the concept of the conference—that legal systems with common roots have developed different but instructive solutions to common problems—"has proven richly rewarding." He observed that "jurists from countries large and small obtained from the conference immediate benefits from their intimate, intensive conversations—exchanges that will continue when they return home." ❑

U.S., Throughout Its History, Has Contributed to Development and Substance of International Law

by Professor Stephen Neff
Department of Public International Law
University of Edinburgh

Like Moliere's famous M. Jourdain, who was surprised to discover that he had been speaking prose all his life, many American judges would be surprised to know that they have been contributing to the development of international law. But they have. Nor is this a new phenomenon, or one confined to the judiciary alone. Throughout American history, there has been a constant—and two-way—flow of ideas and initiatives between the American domestic legal system on the one hand and the international legal system on the other. All three branches of the federal government have participated in this exchange. And the process continues at a greater pace than ever.

In the present discussion, only the most outstanding contributions of the United States to the development of international law can be noted.

War and Neutrality

Questions of war and neutrality were of the most urgent concern and heated controversy in the earliest days of the Republic, which coincided with the French Revolutionary and Napoleonic wars in Europe. Thomas Jefferson, as secretary of state, pressed vigorously for a liberal interpretation of the rights of neutrals (and particularly for the principle that all cargoes on neutral ships at sea must be safe from capture by either belligerent). But Jefferson broke new ground in his parallel insistence that neutral states had duties as well as rights. The result was the first neutrality legislation in the world, designed to ensure that American nationals confined their activities within the bounds of the rights of neutrals. New ground was also broken by the establishment of a panel in 1794 to adjudicate disputes between the United States and Britain on the subject—thereby, incidentally, marking the beginning of settlement of international disputes by means of mixed-claims commissions.

In 1837, perhaps unknowingly, U.S. Secretary of State Daniel Webster formulated the requirements for invocation of a plea by a nation of self-defense under international law in correspondence over the *Caroline* incident, in which British land forces burned the American steamer *Caroline*, which resulted in several deaths. In responding to the British claim of action in self-defense, Webster noted that any action for self-defense must not only be "instant, overwhelming, leaving no choice of means, and no moment of deliberation" but must also be "nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it."

The United States went on to make important contributions to international law as a belligerent, most notably during the Civil War. The promulgation by President Lincoln of the famous "Lieber Code" in 1863, regulating the conduct of the American armed forces (the creation of which was encouraged, if not actually instigated, by Major General Henry W. Halleck, general in chief of all of the Union armies at the time, and himself the author of a major early work on international law), has been universally acknowledged as the basis of the modern international law on the conduct of war.

The judiciary also made lasting contributions to international law at this time. In the *Prize Cases*, 67 U.S. (2 Black) 635 (1863), the Supreme Court clarified various aspects of the law of blockade. It also extended the rights of blockading powers in ways that were controversial at the time but which gained acceptance by international lawyers at large.

Following the Civil War, some of the issues that had arisen in that conflict received further attention. The United States and Britain agreed on the "*Alabama* rules" relating to the duties of neutral states, which formed the basis of proceedings before an international arbitral panel in 1872 (the so-called *Alabama* claims). This panel, incidentally, presented a notable example to the world at large of the value of international arbitration of disputes.

Following World War II, the Supreme Court had the sad occasion to decide what has become the leading case internationally on command responsibility, *In re Yamashita*, 327 U.S. 1 (1946). This is now the leading authority for the proposition that commanders of armed forces are legally responsible for violations of the laws of war and the commission of crimes against humanity by their troops. This issue may surface in the current trials at The Hague tribunal dealing with war crimes in the former Yugoslavia.

The Conduct of Government Investigations

In 1994, the European Court of Human Rights had occasion to consider the distinction between the investigative and adjudicative functions of government, with a view to determining the extent of rights which the party concerned had. The case, *Fayed v. U.K.*, 18 E.H.R.R. 393 (1994), arose from a British government inquiry into a controversial takeover bid and the desire of an individual to sue the government for defamation over the contents of the report. In holding that the European Human Rights Convention did not compel the U.K. to allow such a civil action, the European Court of Human Rights looked to the practice of American courts to assist it in making the distinction between investigative proceedings on the one hand and judicial proceedings on the other. Specifically, it sought guidance from the U.S. Supreme

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U.S. Judge Elected to Lead International Court of Justice

Stephen M. Schwebel, the U.S. representative on the International Court of Justice at The Hague, Netherlands, was elected president of the court by his fellow judges on February 6, 1997.

The court has 15 judges and is the principal judicial organ of the United Nations. The term of the court president is three years.

Stephen M. Schwebel, newly elected president of the International Court of Justice

Judge Christopher G. Weeramantry of Sri Lanka was elected vice president of the court. Other countries currently represented on the court are Algeria, Brazil, China, France, Germany, Hungary, Japan, Madagascar, Netherlands, Russian Federation, Sierra Leone, United Kingdom, and Venezuela.

The International Court of Justice was created during the founding session of the United Nations in June 1945. It operates under a separate statute that was adopted at the same session. It succeeded the Permanent Court of International Justice that was created in 1920 by the League of Nations.

The court hears only cases involving disputes between nations, but may also give advisory opinions on legal questions upon request by organs of the United Nations. Judges of the court are elected by the General Assembly and Security Council of the United Nations for terms of nine years.

Judge Schwebel was first elected to the court in 1981 and served as vice president of the court beginning in 1994. He graduated magna cum laude from Harvard College in 1950 and did postgraduate work at Cambridge University in the United Kingdom in 1950–1951. He earned an LL.B. from the Yale Law School in 1954 and also received an LL.D. from the University of Bhopal in India.

He served as executive director of the American Society of International Law from 1967-1972.

He served as deputy legal adviser of the U.S. State Department from 1973–1981. He had previously served at the State Department as an assistant legal adviser from 1961–1966.

He has been a member of several international commissions, including the International Law Commission of the United Nations from 1977–1981, and has served as a delegate to numerous international conventions and conferences.

Judge Schwebel is also the author of books on the United Nations, international arbitration, and international legal decisions. ❑

Inside . . .

Egyptian Conference Focuses on Role of the Judiciary in the Protection of Human Rights

"The Role of the Judiciary in the Protection of Human Rights" was the theme of a conference for judges, legal officials, and law professors from 19 countries in the Middle East, Europe, and the Western Hemisphere in December 1996 in Cairo, Egypt.

The conference—the first of its kind in an Arab country—was cosponsored by the Supreme Constitutional Court of Egypt and the British Council.

Egyptian Chief Justice Awad El Morr of the Supreme Constitutional Court acted as chairman of the Conference. Dr. Adel Omar Sherif of the same court was a major organizer of the conference and its rapporteur.

Countries represented at the conference, in addition to Egypt, were Abu Dhabi, Bahrain, Brazil, Eritrea, France, Germany, Ireland, Jordan, Lebanon, Lesotho, Palestine, Sudan, Tunisia, Turkey, Ukraine, United Kingdom, United States, and Yemen.

The subjects of discussion at the 10 plenary sessions were the role of judicial review in the protection of human rights; the internalization of internationally recognized human rights standards; the protection of human rights by various courts and in the Middle East and Arab countries; protection of human rights in the criminal law context; judicial protection of basic human rights internally and internationally; the British and Irish experiences in the protection of human rights; and human rights and judicial independence.

The final plenary session featured an open discussion on some recent controversial decisions of the U.S. Supreme Court.

All but one of the plenary sessions were conducted in English. Selected papers from the conference will be published collectively in one volume by an international book publisher.

For information about the conference and about future conferences, contact Dr. Adel Omar Sherif, Supreme Constitutional Court of Egypt, 26 July Street, Cairo, Egypt, phone 574-1397, fax 345-3373; or contact Mr. Richard Hardwick, British Council, 192 Sharia El Nil, Agouza, Cairo, Egypt, phone 303-1514, fax 344-3076, e-mail <britcoun@idsc.gov.eg>.

Dr. Sherif was a Visiting Foreign Judicial Fellow at the Federal Judicial Center during the spring and summer of 1996 (see article on Judicial Fellows, page 3). ❑

Yale Law School Establishes Seminar on Global Constitutional Issues

Yale Law School has established an annual seminar for members of constitutional courts from countries around the world "to participate in a structured and ongoing intellectual exchange" between justices from "mature democracies" and those from countries with developing constitutions and constitutional courts.

The basic purpose of the annual seminar will be to "study and support constitutional law as a global phenomenon."

The first seminar was held in September 1996 and was attended by 14 justices from Canada, Eritrea, France, Germany, Hungary, Israel, Philippines, Poland, Russia, South Africa, Spain, and the United Kingdom.

Justice Stephen G. Breyer represented the U.S. Supreme Court.

The director of the Global Constitutionalism Project is Professor Paul Gewirtz, constitutional law professor at Yale.

Further information about the seminar can by obtained from Ms. Alison Peck, Assistant Director and Senior Research Fellow, Global Constitutionalism Project, Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215, phone (203) 432-7411, fax (203) 422-8260, e-mail <peck@mail.law.yale.edu>. ❑

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A note to our readers

The *International Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to judges from the United States, other countries, or international tribunals. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

SECUNDUM LEGEM

Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law

by Sandra Day O'Connor
Associate Justice
Supreme Court of the United States

(This article has been adapted from a speech given by Justice O'Connor at the 1997 spring meeting of the American College of Trial Lawyers in Florida.)

We live in a world that is constantly shrinking. Cellular phones, fax machines, beepers, e-mail . . . all of these new forms of communications have made it much easier for us to talk to each other, no matter where we are in the world. We need, however, more than technology to communicate with people from other nations. We need language skills, we need deeper understanding of foreign cultures, we need to know how to survive in an increasingly multinational environment. Many of our schools recognize this need, and many parents are taking great interest in language training. High schools now offer more than French and Spanish. They are adding Japanese and Russian, as well. American businesses have been at the forefront of this move toward what newspapers constantly herald as the "globalization" of trade. There are McDonald's restaurants in Moscow, Kentucky Fried Chicken franchises in Beijing.

Other Legal Systems

American judges and lawyers, however, sometimes seem a bit more insular. We tend to forget that there are other legal systems in the world, many of which are just as developed as our own. This shortsightedness begins early in our careers. We learn in law school to look first at the decisions of our own state courts. If we appear in federal court, unless the Supreme Court has spoken to an issue, we look to the law of our local circuit and, perhaps, district. To a certain extent, that is perfectly appropriate because, in the common-law tradition, the only precedents that are truly binding in a given jurisdiction are decisions of our own courts.

Nevertheless, I think that American judges and lawyers can benefit from broadening our horizons. I know from my experience at the Supreme Court that we often have a lot to learn from other jurisdictions. Even after *Erie* and the demise of general federal common law, the federal courts are still charged with the task of developing pockets of common law in discrete areas, like admiralty and maritime jurisdiction. There is also ample precedent for looking beyond American borders in our search for persuasive legal reasoning. In this country's early years, it was commonplace for American courts to follow developments in English courts. Even today, first-year students of contract law cut their teeth on English cases like *Hadley v. Baxendale.* Nineteenth century cases, however, have become historical curiosities. At some point in our history, American judges and lawyers stopped looking abroad for persuasive authority. We have become more inward-looking. Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.

Decisions of Other Courts

As the American model of judicial review of legislation spreads further around the globe, I think that I, and the other justices of the U.S. Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. Some, like the German and Italian courts, have been working since the last world war. They have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies. Others, like the South African court, are relative newcomers on the scene but have already entrenched themselves as guarantors of civil rights. All of these courts have something to teach us about the civilizing function of constitutional law.

The first reason to pay attention to foreign law is that, more and more, foreign law can be applied in American courtrooms. Most commonly, foreign law matters in choice-of-law disputes. As international transactions increase, so do international disputes. Increasingly, courts have to choose not merely between the laws of two American states, but the laws of two or more countries.

Foreign law is important in areas besides choice of law. For example, consider a case where an American lawyer with an American client is sued in a German court by a Swiss party for products liability. Some of the most important witnesses are in the United States and the non-U.S. party decides to seek depositions in the United States. Research yields the proposition that American law allows foreign parties to seek discovery under the Federal Rules of Civil Procedure, to aid the case abroad. Under case law, however, the availability of discovery in federal court depends in part on whether the German court would allow that kind of discovery in Germany. American lawyers can't be expected to have that sort of knowledge of procedure in a foreign country at their fingertips, but it's important to know where and how to find it—possibly through the lawyer's own research, and more likely by contacting counterparts in Germany.

Understanding the Civil-Law System

A rudimentary understanding of the civil-law system would immediately suggest one line of defense: the American lawyer would know from research or consultation, at a minimum, that Continental legal systems are loath to allow the parties to depose witnesses without the supervision of the presiding judge. That divergence between American and German legal systems might not be dispositive of whether the depositions could be blocked, but a basic awareness of foreign legal systems would at least equip the American lawyer with knowledge to protect the client's interests.

A second reason for American judges and lawyers to study foreign legal systems is that we can discover ways of improving our own systems. Laws are organic, and they benefit from cross-pollination. We should keep our eyes open for innovations in foreign jurisdictions that, with some grafting and pruning, might be transplanted to our own legal system.

I have had the wonderful opportunity to participate in several Anglo-American legal exchanges where we have compared British and American approaches to criminal law, to administrative law, to court management, to constitutional law. Among the most interesting comparisons for me have been the techniques used in Great Britain to select and use jurors, the vastly greater civility shown in Great Britain between lawyers and judges, and the limited extent of discovery in civil cases.

Italian Penal Code

One of the most interesting examples of borrowing foreign legal ideas can be found in the Italian Penal Code, which was re-

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Leaders of Russian Judiciary Meet in U.S. to Plan Future of Courts

Four officers of the Russian Council of Judges, the ruling body of the judicial branch of the Russian Federation, met with U.S. judges and senior court officials of the Federal Judicial Center (FJC) and the Administrative Office of the U.S. Courts (AO) in Washington in March for intensive discussions relating to the structure and administration of the Russian court system.

The discussions were held because of the Russian Federation's adoption in December 1996 of a law that creates a judicial department under the Russian Supreme Court. The new department is intended to operate in a manner similar to that of the Judicial Conference of the United States, the national policy-making body for the U.S. federal court system.

The Russian delegation, headed by Justice Yuri Ivanovich Sidorenko of the Russian Supreme Court and chairman of the Russian Council of Judges, reviewed programs and procedures of the Judicial Conference, the FJC, and the AO for possible inclusion in the new Russian Judicial Department.

Other members of the Russian delegation were Judge Vladimir Nikolaevich Ananyev, deputy chairman of the council of judges and chairman of the Yaroslavl Oblast Court; Lieutenant-General Anatoliy Alesandrovich Vasyagin, a second deputy chairman of the council and a military judge in Moscow; and Judge Ivan Andreevich Tivodar, a member of the presidium of the Council of Judges and chairman of the Adler District Court in Sochi, a Russian city on the Black Sea.

The program for the Russian visitors included talks about the structure and functions of the Judicial Conference and its committees; court governance at the national level, with special emphasis on finance and budget issues; facilities and security; gathering and using statistics; judicial education and court employee training; the development and use of technology for courts; the role of policy research in developing administrative policy; and court administration and court governance at the regional and local levels.

The judges also visited the U.S. District Court for the Eastern District of Virginia, in Alexandria, Va., for discussions with Chief Judge James C. Cacheris and District Court Clerk Norman H. Meyer, Jr. and to view court facilities.

Upon his return to Russia, Justice Siderenko commented that the program was "all very well organized and executed." He said that the discussions "would be very useful to me and the Council of Judges in the future."

"We received answers to all of the questions which are presently of interest to us," he said.

The discussions were funded by a grant from the U.S Agency for International Development. They are part of a series of contacts, conferences, and exchanges between judges in the United States and those in the Russian Federation that began in 1992. ❑

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Court case of *Hannah v. Larche*, 363 U.S. 420 (1960), which concerned investigative action by the Civil Rights Commission.

International Crimes

The United States has made important contributions to this subject since its active participation in the Nuremberg trials at the end of the Second World War. Since that time, the subject has become one of the most rapidly developing fields of international law. Its cornerstone is the concept of "crimes under international law," which are offenses against the entire world at large, triable by international criminal tribunals. (In this connection, see the article by William C. Gilmore, "Progress Toward the Creation of an International Criminal Court," *International Judicial Observer*, Sept. 1996, no. 2 at 2.)

The leading case internationally on what constitutes a crime under international law is *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), concerning whether torture under color of state authority is a crime under international law. The issue arose in the interpretation of a domestic statute, the Alien Tort Claims Act, 28 U.S.C. § 1350, which gives a private right of action in federal courts to aliens for a "tort . . . committed in violation of the law of nations." The Second Circuit held that torture committed under color of state authority fits within this rubric because it is now seen as a crime under international law. This landmark judgment is cited in courts all over the world.

American courts are continuing to develop this line of cases. The District of Massachusetts, for example, in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995), held three other offenses to be crimes under international law, provided that they were committed under state authority: summary executions, disappearances, and arbitrary detentions (citing, among other authority, the Universal Declaration of Human Rights). Interestingly, this court held that cruel, inhuman, and degrading treatment is *not* in the category of crimes under international law—relying heavily for this conclusion on the European Court of Human Rights case of *Ireland v. U.K.*, 2 E.H.R.R. 25 (1978).

American courts have also considered whether private acts (acts not done under state authority) can be crimes under international law. The Second Circuit has held that genocide and war crimes are in this category, even if done by private parties—but that torture and summary execution are not (i.e., they are crimes under international law only if committed under state authority). *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). It has also been held that terrorism is not—at least as yet—a crime under international law. *Tel Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984). It is probable that there will be further case law from American courts in this important area.

Refugees

In the Refugee Act of 1980, the United States incorporated into federal law the international legal definition of "refugee" from the 1951 U.N. Convention on the Status of Refugees. Over the years, the convention has been interpreted in many national courts. But one of the most significant cases was an American Supreme Court decision interpreting the vital provision on non-refoulement. This is the obligation of states' parties, under the 1951 Convention, not to "expel or return" a refugee to a place where he or she will face persecution. The leading case on the meaning of the provision comes from the U.S. Supreme Court: *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), which held controversially that the American policy of excluding Haitians from entry into the United States did not violate the non-refoulement obligations of the 1951 convention.

Conclusion

The United States has a long and proud tradition of contribution to the evolution and substance of international law. But it should be stressed that this is more than a mere historical curiosity. The interplay between domestic and international law is greater now that it has ever been. All signs point to its becoming greater still in the future, most probably in the areas of human rights and international criminal law. American judges are, of course, aware of how important their decisions can be for the future of their own nation. But they should remember that their decisions can be important for the entire world as well. ❑

The FJC's Visiting Foreign Judicial Fellows Program

The Federal Judicial Center has, since 1992, conducted a Visiting Foreign Judicial Fellows program, in which judges from other countries are in residence at the Center for periods of one to six months to conduct an independent research project on some aspect of the U.S. legal system or some issue or matter relating to courts or judges generally. The Federal Judicial Center provides no funds to visiting fellows (outside funding must be obtained for travel and subsistence). The Center does provide for each fellow an office, desk, computer, and computer training; research guidance and assistance; and introductions to local courts, judges, and law libraries. Further information about the program can be obtained from the Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003, phone (202) 273-4061, fax (202) 273-4019, e-mail: <japple@fjc.gov>. ❑

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vised approximately ten years ago, at least partly to reduce the country's tremendous backlog of criminal cases. Every criminal defendant in Italy had to go through a full-blown trial—even if he confessed his guilt. Cases were delayed for years. In an attempt to speed up the legal process, the Italian legislature looked at other legal systems, including our own. One aspect they found useful was plea bargaining, which dangles before defendants the carrot of a lower sentence, to entice them to forgo trial. Of course, it is impossible to import any idiosyncratic institution from an adversarial common-law system to an inquisitorial civil-law system without making some changes. Ideas have to be carefully tailored to fit the legal landscape of the importing country. Plea bargaining in the United States is premised on a system where the government enjoys broad prosecutorial discretion and the parties are entitled to negotiate a compromise settlement. In Italy, by contrast, judges take charge. Judges traditionally take a very active role in the criminal investigation, examine the witnesses extensively at preliminary hearings, and tightly control the decision whether an accused criminal should proceed to trial.

Under the new Italian Penal Code, defendants cannot simply plead guilty and move straight to sentencing for serious crimes. All they can do is ask the judge to forgo the formal trial and instead decide the case based on the extensive record of the preliminary hearing. If the defendant is found guilty, he is entitled to an automatic one-third reduction in his sentence. As in the United States, the defendant has an incentive to avoid a lengthy, costly trial. But this modified system of plea bargaining leaves much more control in the hands of the judge, as is customary in civil-law systems.

Finally, I think it is important to emphasize how studying the law of other countries can reduce the costs of transnational litigation. Lawsuits do not always confine themselves to a single courtroom. Just as cases bounce from state to federal court in the domestic setting, parties may seek judicial remedies in the fora of several nations. By coordinating the rules that govern crossborder judicial proceedings, we can cut down on the time and expense of multinational litigation. And judges and lawyers don't have to leave this work to the State Department.

Efforts in Arizona

I am thinking in particular of some efforts in my home state of Arizona that have sprung from the momentum of NAFTA. About a quarter of Arizona's exports, worth about $2 billion, go to Mexico. Trade between the United States and Canada has increased from $211 billion a year to $290 billion a year since NAFTA came into effect. Trade spawns legal disputes, and judges and lawyers alike inevitably find themselves working to solve problems that stretch across the Mexican and Canadian borders. Since the passage of NAFTA, there have been several initiatives among the bench and bar in Arizona to promote legal cooperation with Mexico. One instance that stands out is a meeting in 1992 between the judges from the Arizona supreme court and their counterparts from the Mexican state of Sonora. The judges met to discuss judicial cooperation relating to service of process, crossborder collection of evidence, and enforcement of foreign country judgments. One of the first steps in this newly formed relationship was to try to understand the procedures in each other's jurisdictions. From that starting point, the judges looked for ways to make it faster and less expensive to chart one's way through the labyrinth of crossborder litigation.

One particular issue—how to enforce foreign judgments—illustrates how a careful comparison of procedures in Mexico and the United States can shed light on how two disparate legal systems can accommodate one another. Sonoran state courts will enforce a judgment only if it is final, and they do not consider a judgment final if it is subject to impeachment in the rendering jurisdiction. What happens if a party wins a judgment in Arizona state court against a Mexican company and then tries to enforce the judgment in Sonoran courts? Theoretically, under the Arizona rules of civil procedure, a judgment may be open to collateral attack *forever* on the grounds that it is void. That sort of rule is, however, quite literally "foreign" to Sonoran law. If a Sonoran court was purely inward-looking, and relied solely on how judgments work in Mexico, an American might never be able to go to Mexico to execute an Arizona judgment.

Problem Solved

How can this problem be solved? One possibility raised in the discussions between the judges of the two countries' local courts was that the Sonoran courts might consider, when determining whether an Arizona judgment is "final" for purposes of enforceability, the way that such judgments are treated in American courts. Of course, in Arizona they are immediately enforceable, regardless of the hypothetical possibility that a motion to vacate might be filed in the distant future.

I do not know how the Sonoran courts have followed up on this suggestion. What I want to emphasize is the *process* by which lawyers and judges of two countries looked for ways to coordinate their procedures. They met, they talked about the similarities and differences of their two legal systems, and they looked for ways to accommodate the needs of both. I think that their approach demonstrates how useful it can be to study and compare the laws of other countries.

There are certainly many reasons why American judges and lawyers should pay attention to foreign legal systems. I have just highlighted three of them: to know how to apply foreign law in domestic courts, to borrow new ideas for our own legal institutions, and to enhance crossborder cooperation. Judges must be versed in other legal systems to do justice between the parties before them. Practicing lawyers must broaden their knowledge of foreign law simply to serve their clients better. But long-term considerations, I think, are most important. The vibrancy of our American–Anglo legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain a progressive legal system, a system that is able to cope with a rapidly shrinking world. ❑

Interview with Judge Alexander Galkin of the Russian Federation

The following is the text of an interview with Judge Alexander Ivanovich Galkin on the first jury trial held in the Russian Federation under the new Russian constitution. This interview was conducted at the Federal Judicial Center, Washington, D.C., on September 3, 1996, by James G. Apple, chief, Interjudicial Affairs Office, Federal Judicial Center and editor, International Judicial Observer. The translator for the interview was Yuri Shkeyrov.

Since the advent of jury trials in the Russian Federation in November 1993, hundreds of jury trials in criminal cases have been conducted in the nine oblasts [regions] where they are authorized.

James Apple: Could you tell us where you received your legal training and what was your job before you became a judge?

Alexander Ivanovich Galkin: I graduated from Saratov Law Institute in 1972.

JA: And what did you do after you graduated from the law academy?

AIG: From 1972 through 1974 I worked as an investigator in the prosecutor's office. And in 1974 I was elected an *oblast* court judge. In 1984 I was elected deputy chairman of the *oblast* court. And in 1987 I was elected chairman of the court. Therefore my judicial career spans more than 20 years.

JA: Where is Saratov located in Russia?

AIG: Saratov is located between Volgagrad, formerly Stalingrad, and Samara . . . It's about 900 km from Saratov to Moscow.

JA: Why was your court picked to conduct the first jury trial?

AIG: . . . When it became clear that jury trials were imminent, they offered our *oblast* and they asked me to conduct a jury trial as one of the first jury trials . . . .

JA: And it is my understanding that the trial was a murder trial. It involved charges of murder against two persons.

AIG: Are you talking about the first jury trial?

JA: Yes.

AIG: Well if I may I would like to say a few words about what preceded this whole thing—this first jury trial. At that time we did not study anything about jury trials in our academy and the whole procedure was entirely new to us. Therefore in 1992 a group of judges from Russia . . . traveled to the United States, including Boston, where at Harvard University we explained to our American colleagues what we were about to do. They shared their opinion of it. So basically they reviewed our proposal and we also went to a number of courts where we observed the jury-trial procedures.

And that two-week stay in Boston allowed us, and me in particular, an opportunity to learn a little bit about jury trials, so at least I had an idea what it was about. . . . There was some training conducted at the legal academy in Moscow, but most of all we paid even more attention to the Russian experience with jury trials since 1864. We in our court looked at the archival documents, archival materials in order to learn about jury trials in Russia. And we prepared, created a sample benchbook and had these moot trials, or mock trials.

And the answer to the question why Saratov, I would say it was just by accident, and it was related to the work that we had. Simply speaking, in November [1993] our court received a case in which the defendant petitioned or asked for a jury trial. After the appropriate preliminary procedure (I would say that it probably coincides or corresponds to the American procedure of filtering out those proofs, that evidence which is not admissible) and having asked the defendants whether or not they still want the jury trial, they said yes and it was scheduled, the hearing was scheduled for December 15 [1993].

The facts of this case were as follows: Two brothers, they were gypsies, were accused of murdering two people. Basically they were accused of intentional murder. . . . Now if you asked me what was the outcome

Russian Federation Judge Alexander Ivanovich Galkin, center, talks with Judge Michael M. Mihm (U.S. C.D. Ill.) and Judge Cynthia Holcomb Hall (U.S. 9th Cir.) at the Federal Judicial Center in September 1996

of the trial, the jurors said that these two people were guilty of murder, but that the murder was in self-defense but they exceeded the limits of self-defense.

In other words, the jurors came to the conclusion that the defendants were attacked by those three other people, but while defending themselves they exceeded the allowable limits.

JA: Used excessive force.

AIG: Yes, that's it. The trial lasted three days, so the verdict was announced on the 17th, and on the 18th the sentencing took place.

JA: How many were on the jury, how many jurors?

AIG: We invited 40 people . . . After the selection process, we ended up selecting fourteen—twelve jurors and two alternates.

JA: What were your impressions of the first jury trial, about how it was conducted and whether it was a good way to achieve justice?

AIG: Well, it's very difficult for me to assess the trial because I presided over it, I conducted it.

Now if you ask me, I could answer another question. If you ask me why did I decide to conduct this first jury trial? There were 20 more judges in the *oblast* court. And when I was trying to answer this question to myself, here's what my approach was like: Since this is a new issue and a new procedure and also I agreed to this possibility of conducting a jury trial in Saratov when I talked to the president's office, somehow I felt uncomfortable about asking somebody else to conduct it. Therefore since I started all this, then I decided I should be the one who should attempt to conduct this trial. . . .

JA: Were you, as a judge, generally satisfied with the verdict of the jury? Did you think it was a fair verdict?

AIG: I think that based on the evidence presented in that case, if that trial was conducted in the usual manner, not by jury but one where it is based on the judge deciding whether or not the person is guilty, I would say the sentence would have been the same, the result would have been the same. . . .

JA: What were you going to say about the assessment of the jury trial?

AIG: There were many people, judges, experts, and so on from the United States, and there were representatives of radio and TV, also from the United States. Therefore they were able basically to evaluate what happens in a jury trial, but I liked what one of them said. This person said that, "Judge Galkin is capable of presiding over a jury trial in the United States."

As far as my own first impression of the trial, the first thing that I liked was the spontaneity of it all because usually when I preside over a trial, I have to argue, I have to investigate, and here I simply let the lawyers of the two parties do all the arguing and investigating. What was more difficult was to prevent the jurors from hearing something that should not have been presented to them, something that had been obtained in violation of the law. And the newest thing, the most unusual thing for us, was my instructions so-called to the jury before they went to the jury room to decide on a verdict because it was very important that I not show my personal thoughts, my personal opinion of this case. . . .

JA: What were your impressions of the performances of the prosecutor and the defense lawyers?

AIG: The prosecutor was well prepared. One of the defense attorneys was good—he showed courage and so on, and the other one was not so good, he was weak. So for the first trial the prosecutor was better prepared. These days defense attorneys are much stronger since they have gained some experience. And the prosecutors have basically stagnated. . . .

JA: How many jury trials have you conducted since the first jury trial?

AIG: I have conducted only four since that first jury trial. Because I am the chairman [of the court] I cannot hear many cases since I have lots of administrative functions. If the roof leaks or there is no water.

JA: How many jury trials have been conducted among your colleagues in Saratov over the last few years?

AIG: As of 1994, 18% of all cases heard by the court have been jury trials.

JA: Can you give us an estimate of the number?

AIG: Now in the first six months of this year [1996] 60% of all cases are jury trials. And if in 1994 the number was 16, now the number is approaching 50 this year. . . . So we can say that the number of jury trials is growing and the defendants have more and more trust for jury trials. . . .

JA: What is your opinion of jury trials generally now that you have had some experience with them?

AIG: Well, I think that it's the wave of the future, but it's not easy. It's not easy because some obstacles are being put in there, in jury trials. For example, I know for a fact that a prosecutor from our *oblast* wrote a letter to the senators, we have two senators, one is the governor and the second one is the chairman of the Saratov Duma [legislative body] and both of them are members of the Federation Council. So this prosecutor addressed them or wrote a letter to them asking them to put an end to jury trials in Saratov.

Now the question is why? Analyzing this letter I can say that the prosecutor's office hasn't yet learned how to conduct the investigation of the case, observing all the laws, since we exclude a lot of evidence in every case because this evidence was obtained in violation of the law. But I believe that the letter that the prosecutor wrote remained just that, just a letter and I don't think it will lead to any consequences. In nine regions jury trials are conducted . . . and jury trials are supposed to be expanded to twelve more regions in the beginning or middle of next year [1997].

Yet I think that there is an aspect to all this which is in violation possibly of the [Russian] Constitution or of human rights, since as of today, jury trials are conducted only in nine regions. Defendants in other regions do not have the same rights as the defendants in those nine regions. So in other words, we cannot say that they're all equal before the law. And this contradicts the Constitution, which says that every defendant has the right to a jury trial.

But I understand that we cannot introduce jury trials all over Russia at once. This is a matter of finance, a matter of finding buildings and so forth.

Yet there is a way out. According to our law, the chairman of the Supreme Court can actually change jurisdiction, laws regarding jurisdiction. So for example, if the defendant is in some other *oblast* and he requests jury trial and he's not far from the Saratov *oblast*, why not transfer his case to Saratov? So it's not impossible that we will choose this way of doing things because to introduce jury trials all over Russia is a very, very long process. . . .

JA: What is the opinion of your colleagues, other judges who have tried jury trials, about jury trials? Do they like them generally?

AIG: Are you talking about my court?

JA: Yes, and generally other judges in Russia.

AIG: All judges who have conducted jury trials do not want any other type of case, since they feel that this type of trial allows, gives them an opportunity to feel more independent.

JA: And did the citizens generally that you have come into contact with like the idea of jury trials?

AIG: Well, it differs and it's natural, but I would like to say a few words about how jurors feel about these trials because these labs did some studies and some research. So far it hasn't happened that a trial would be canceled because the jurors failed to appear. In my opinion this is already an indicator of something.

Also after jury trials all jurors are asked to complete some questionnaires and none of them declined. This also tells you something. But the most interesting thing is that their responses to various questions on the questionnaires demonstrate or indicate that they are interested in the proceedings, that they really have an interest in them.

They were asked would they want the prosecutor to tell them what evidence the prosecutor is going to present and how he or she is going to substantiate the charges. An overwhelming majority said yes because "we want him [prosecutor] to first tell us so that after that we would know what to expect and would be able to consider all this evidence."

And an overwhelming majority of the jurors said that the defendant deserves mercy, basically leniency. We ask them why? Why do they want that? And the majority of them said that the reason why they say that is that they're afraid that the judge might apply the death penalty and they want no part of that.

JA: In summation, would it be correct to say that you feel that the jury system has taken root in Russia, its prospects for the future are good?

AIG: Well, I think I have basically answered this question because I said this is the wave of the future. Since this is not the year 1994 where it only started growing, was only emerging, now I would say it has good strong roots and now this tree is expanding because twelve more regions . . . want to use the system, want to use jury trials in their regions. And I believe that nobody can stop the progress of the jury trials because the judges would not allow it. ❑